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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 889.

ZIM ISRAEL NAVIGATION CO., LTD., as owner of Steamship *ISRAEL*,

Petitioner,

v.

UNITED STATES LINES COMPANY,

Respondent,

and

Steamship *AMERICAN PRESS*.

(And Cross-Suit)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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March 3rd, 1965.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 889.

ZIM ISRAEL NAVIGATION CO., LTD., as owner of Steamship *Israel*,

Petitioner,

v.

UNITED STATES LINES COMPANY,

Respondent,

and Steamship *American Press.*

(And Cross-Suit)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

JURISDICTION

The petition for certiorari herein should be denied for lack of jurisdiction, because it was not filed within ninety days after entry of the judgment sought to be reviewed, as required by 28 U. S. C. A. §2101(c), and the time was never extended as provided for in the same statute.

In stating the basis of this Court's jurisdiction, the petitioner has patently omitted an adequate description of the material sequence of events.

The judgment of the Court of Appeals was entered and filed in the office of the clerk on August 19, 1964. Under Court of Appeals Rule 25, any petition for rehearing was required to be filed within fifteen days from the filing of the opinion in the clerk's office, i.e. by September 3, 1964. Petitioner did not petition for rehearing within that time but, on November 23, 1964, moved for leave to file a petition for rehearing, said petition being annexed to the moving papers. That motion was filed some ninety-six days after entry of the Court of Appeals' judgment,—six days after the time to petition for certiorari had expired. On December 4, 1964, the Court of Appeals ruled:

> "Application for permission to file petition for rehearing granted—Petition for rehearing denied."

This petition for certiorari was filed February 8, 1965.

Petitioner's belated application to the Court of Appeals for leave to petition for rehearing should not operate to extend its time to apply to this Court for certiorari. See *Bowman* v. *Loperena*, 311 U. S. 262, 266 (1940) and *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U. S. 206, 211-212 (1952).

In any event, where the time within which to bring the matter before this Court has expired, petitioner should not be permitted to reinvest itself with that right simply by obtaining leave to file an untimely petition for rehearing, which was denied in the same order granting such leave. Such a procedure would, in effect, grant a power to a Court of Appeals to control the time for certiorari even though such time had expired. See *Conboy* v. *First National Bank*, 203 U. S. 141, 145 (1906) and *Credit Company Limited v. Arkansas Central R. Co.*, 128 U. S. 258, 261 (1888). Only

a justice of this Court can extend the time and then only on a showing of good cause. 28 U. S. C. A. §2101(c).

The Questions Presented for Review

The questions which petitioner seeks to present for review (Petition, p. 2) are not significantly related to the facts in this case, as found by the District Court and affirmed by the Court of Appeals.

Statutes and Regulations Involved

The statutes and regulations concerning the collision aspects of this matter are set forth in the Petition, pp. 3-4.

The statute and rule pertinent to the untimeliness of this Petition are:

28 U. S. C. A. §2101.

"Supreme Court; time for appeal or certiorari; docketing; stay

* * * * * *

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

* * * * * *

U. S. Court of Appeals 2d Circuit, Rule 25, 28 U. S. C. A.

"Rule 25. Petitions for Rehearing

"(a) Time; Form. Any petition for rehearing shall be filed with the clerk of the court within 15 days from the filing of the opinion in the clerk's office."

* * * * * *

Statement of the Case

In stating the case, the Petition omits several material findings of the District Court. Moreover, it contains one grave mis-statement,—i.e., contrary to the Petition (page 5), the District Court did not rule that the *American Press* was deficient in lookout.

Briefly, the sequence of material events, as found by the District Court and affirmed by the Court of Appeals, was as follows:—After sighting the *Israel* on a crossing course at about 8:21 p.m.*, the *American Press* reduced from full ahead maneuvering speed to slow ahead at 8:22 and sounded a one-blast whistle signal. At about the same time the *Israel* sounded and repeated a one-blast signal. Neither ship heard the other's signal. At 8:22½, with the vessels about one mile apart and the *American Press* already reducing speed, the *Israel*, contrary to her duty to keep her speed, stopped her engine. [The Petition omits mention of this first statutory violation, which was committed before the *Israel's* asserted first danger signal.] The *American Press* stopped her engine at 8:23. At 8:23½ the *Israel* went full astern. At 8:24 the *American Press* went half astern and, at the same time, the *Israel* again stopped her engine. At 8:24½ the *American Press* went full astern, followed by emergency full astern and the *Israel* did the same. At 8:25½ the *American Press* let go her port anchor. With the *Israel* slowing and being set by the ebbing tidal current toward the *American Press*, collision occurred one minute later,—at 8:26½ p. m.

The District Court held that the *Israel* breached her duty to keep her speed when, between 8:22½ and 8:24½,

* All times in this brief are *American Press* bridge time to which *Israel* times have been adjusted by adding one-half minute (District Court Opinion, U. S. Lines Appendix pp. 58a-59a).

she stopped her engine, reversed her engine, stopped her engine and again reversed her engine, on its finding that the time had not then come for her to change speed on any basis of immediate danger. Indeed, the District Court found that, up to the *Israel's* emergency full astern order at 8:24½, her own pilot believed the *Israel* could safely cross the *American Press's* bow. (Opinion, U. S. Lines Appendix, pp. 56a-58a.)

The *Israel's* faults were held contributory to collision. (Opinion, U. S. Lines Appendix, pp. 63a-64a.)

The District Court held that the *American Press* was also in contributory fault, in essence for not keeping out of the way of the *Israel,* despite the *Israel's* concurrent or subsequent acts of negligence on the reasoning that the *American Press* should have altered course to starboard or reduced speed more quickly, or both. (Opinion, U. S. Lines Appendix, pp. 58a-63a.)

The Court of Appeals affirmed, with one judge dissenting. (Attachment A of Petition, p. A-1.)

Argument

This cause concerns a simple collision, and the *Israel's* faults and liability were properly determined by the application of well settled principles of law to the facts found by the District Court. As such, it does not warrant review by this Court on certiorari.

It is self-evident that the *Israel* caused danger of collision and collision itself by her repeated violations of 33 U. S. C. A. §206 (Petition, p. 3) which required her to keep her course and speed. Thus, on the facts found by the District Court, *supra,* pages 4-5, four and one-half minutes before collision the *American Press,* in compliance with her duty, started to reduce speed by putting her engine

slow ahead; one-half minute later the *Israel* stopped her engine. Three and one-half minutes before collision the *American Press* stopped her engine; one-half minute later the *Israel* went full speed astern. Two and one-half minutes before collision the *American Press* went half speed astern and the *Israel* simultaneously, and inconsistently, stopped her engine. Two minutes before collision the *American Press* went full speed astern, and the *Israel* did the same. One minute before collision the *American Press* dropped her anchor. The *Israel* did not use an anchor.

It is plain that the speed reductions properly taken by the *American Press* to keep out of the *Israel's* way were improperly offset and finally neutralized altogether by the unpredictable and premature reductions in the *Israel's* speed, all in violation of her duty to keep her speed. That such was the case is emphasized by the fact that, despite the *Israel's* repeated speed reductions, about one-half of her length crossed the *American Press's* bow before collision; if she had kept her speed, she obviously would have crossed safely ahead. The courts below correctly held the *Israel* in fault and liability for her repeated breaches of duty. To condone actions such as the *Israel's* would force a giving-way vessel to speculate on the other's navigation, in which case the rules for prevention of collision might as well be discarded, as navigation would be reduced to a game of bluff. See *Helenic Lines* v. *The Exmouth*, 253 F. 2d 473, 476 (2d Cir. 1958), cert. den. 356 U. S. 967. This Court has often emphasized the necessity for requiring the holding-on vessel to keep course and speed, a principle squarely applicable to condemn the *Israel's* navigation. See *Wilson* v. *Pacific Mail S. S. Co.*, 276 U. S. 454, 461-463 (1928); *The Delaware*, 161 U. S. 459, 469 (1896); *Hutchinson* v. *The Northfield*, 154 U. S. 629, 630 (1878); *The Britannia*, 153 U. S. 130, 142-143 (1894); *The Corsica*, 76 U. S. 630, 633-634 (1869).

The facts and law in *Postal Steamship Corporation* v. *SS. El Isleo,* 308 U. S. 378 (1940) are clearly distinguishable from those in the cause at bar. The controlling difference is that in *El Isleo* the giving-way vessel sounded a two-blast signal, in effect indicating an unlawful intent to cross the holding-on vessel's bow. The holding-on vessel answered with an alarm and one blast, thus sounding a cross signal (i.e. answering two blasts with one), and then maintained speed until collision was imminent. In the context of that situation this Court merely held (page 387) that Inspectors' Rules II and VII [now respectively 33 C. F. R. §§80.2 and 80.7,—Petition, p. 4] were not essentially inconsistent with 33 U. S. C. A. §206, and were valid. The case was remitted for final decision to the Court of Appeals, which held, in *Postal Steamship Corporation* v. *Southern Pacific Company,* 112 F. 2d 297 (2d Cir., 1940), at page 298:

> "There can be no doubt that the Supreme Court meant to hold that in a crossing case, *when the holding-on vessel gets two blasts from the giving-way vessel, which are unacceptable to her,* she must neither cross the signal, nor keep her speed, but must at least stop her engines, and if necessary back, 'until signals for passing with safety are made and understood'. (Rule VII)." (Emphasis supplied.)

However, in the cause at bar, the *American Press* never sounded a two-blast signal or any other unlawful signal and commenced reducing speed four and one-half minutes before the eventual collision, when the ships were a mile or more apart. Therefore, the condition of an unacceptable two-blast signal, which would permit and indeed require the holding-on vessel to stop and back under 33 C. F. R. §80.7, did not exist, and *Israel's* speed changes, in violation of the basic statute (33 U. S. C. A. §206), cannot be justified under 33 C. F. R. §80.7 or *El Isleo.*

In summary, to assure certainty of navigation and thereby diminish risk of collision, under the authoritative decisions of this Court, the *Israel* was required to keep her speed until departure from that duty was necessary to avoid immediate danger absent a definite indication that the *American Press* did not intend to comply with her own duty. On the facts, both courts below properly concluded that the *Israel's* departure from her duty was not justified. To have held otherwise would virtually abrogate the statutory crossing rules and the decisions of this Court, *supra*, page 6.

Finally, review of the questions posed by petitioner would serve no important purpose for future guidance of the courts and government agencies as petitioner contends. The United States Coast Guard is now preparing proposals for legislation which would substantially revise the statutory Inland Rules to make them consonant with new International Rules, which will become effective on September 1, 1965, entailing probable elimination of the pilot rules (33 C. F. R. §§80.2 and 80.7) material to this cause. See ***Proposal to Establish a Uniform Set of Rules of the Road Based upon the 1960 International Rules***—issued by U. S. Coast Guard in 1964.

Conclusion

Wherefore, respondent prays that this petition for a writ of certiorari be denied.

Respectfully submitted,

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United States Lines Company

Dated: March 3rd, 1965